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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Equal Employment Opportunity)	MM Docket No. <u>96-16</u>
Rules and Policies and)	
Termination of the EEO)	
Streamlining Proceeding)	

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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March 1, 1999

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The National Cable Television Association ("NCTA"), by its attorneys, submits the following comments in support of the Commission's proposals with regard to cable EEO rules and policies set forth in the Notice in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY: THE CABLE INDUSTRY IS FULLY COMMITTED TO THE PROMOTION OF EQUAL OPPORTUNITY IN CABLE EMPLOYMENT

The cable industry supports the maintenance of the FCC's existing EEO requirements as detailed in the Notice in this proceeding. We have been and remain committed to a recruitment program that fosters equal opportunity in employment. In general, the analysis and recordkeeping procedures proposed in the Notice will facilitate this program. The proposed sanctions, properly and reasonably applied, will ensure fair and effective implementation of the new procedures.

¹ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, FCC 98-305, rel. Nov. 20, 1998 ("Notice").

In addition to supporting the maintenance of existing FCC EEO requirements, NCTA supports a flexible recruitment program backed by Commission enforcement procedures, including recruitment mechanisms and procedures for analysis, recordkeeping and sanctions. A voluntary program, while well-intentioned, is no substitute for a program enforced by the Commission. The suggestions we make in these comments for such an enforceable program avoid Commission micromanagement in this area while achieving the important goals sought by the FCC.

When Congress adopted the EEO provisions of Title VI of the Communications Act in 1984, it found that “increasing the amount of cable programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper level positions within media companies.”² It further recognized that “a strong EEO policy is necessary to assure that there are significant numbers of minorities and women with professional and management level experience within the cable industry, so that there are significant numbers of minorities and women with the background and training to take advantage of existing and future cable ownership opportunities.”³

Section 634 of the Communications Act, as amended, prohibits discrimination in employment by cable operators and other Multichannel Video Programming Distributors (MVPDs) “because of race, color, religion, national origin, age, or sex.”⁴ The section further directs cable companies to establish and execute “a positive continuing program

² “Cable Franchise Policy and Communications Act of 1984,” Report of the Committee on Energy and Commerce, Report No. 98-934, 98th Cong., 2d Sess. 85-86 (“House Report”).

³ Id. at 86.

⁴ 47 U.S.C. § 554(b).

of specific practices designed to ensure equal opportunity in every aspect of its employment policies and practices.”⁵ In enacting the legislation, Congress found that “equal employment opportunity requirements are particularly important in the mass media where employment is a critical means of assuring that programming will be responsive to a public consisting of a diverse array of population groups.”⁶

The cable industry has adopted a comprehensive EEO program that fully complies with Section 634 and with the detailed rules adopted pursuant to that section. The industry has fully complied with EEO requirements.

The Commission now seeks comment on several proposed changes to its EEO rules and policies consistent with the D.C. Circuit’s decision in Lutheran Church-Missouri Synod v. FCC.⁷ The Commission proposes to substantially maintain the existing cable EEO requirements. The Commission proposes no changes to the general EEO policy.⁸

The Commission proposes changes to four subsections of Section 76.75, which set forth the rules concerning cable’s EEO requirements. First, Section 76.75(b) would require all cable operators covered by the rules (*i.e.*, cable systems with a minimum of six employees) to “recruit for every job vacancy.”⁹ The rule excepts from this requirement

⁵ 47 U.S.C. § 554(c).

⁶ House Report at 85.

⁷ Lutheran Church-Missouri Synod v. FCC, 141 F. 3d 344 (D.C. Cir. 1998), *rehearing denied*, Sept.15, 1998.

⁸ 47 C.F.R. § 76.73(b).

⁹ Supra n.1, Appendix B.

any internal promotion because an internal promotion is “not considered a vacancy for which recruitment is necessary.”¹⁰

Second, the Commission, pursuant to new Section 76.75 (c), proposes to require cable systems to maintain records to prove that they have complied with the recruitment procedures and that they are able to analyze their recruitment efforts. In particular, cable systems will be required to retain records listing the recruiting sources utilized for each vacancy and the date the vacancy was filled.

Third, new Section 76.75(f) would require a cable system to analyze in detail its efforts to “recruit, hire, promote and use services without discrimination on the basis of race, ethnic origin, color, religion, and gender and explain any difficulties encountered in implementing its equal employment opportunity program.”¹¹

Finally, in new Section 76.75(g),¹² the Commission proposes to impose “appropriate sanctions” in those instances where cable operators are found not to be in compliance with subsections (b), (c), and (f) of Section 76.75.

We endorse the goals these proposals aim to achieve and discuss in these comments our views on the particular proposals in the Notice.

II. THE COMMISSION SHOULD AFFORD CABLE OPERATORS THE DISCRETION TO DETERMINE HOW TO CONDUCT RECRUITMENT EFFORTS THAT ATTRACT A BROAD CROSS SECTION OF QUALIFIED APPLICANTS

The cable industry fully supports the Commission’s goal of ensuring that “all qualified applicants, whether minority or non-minority, male or female, are notified of,

¹⁰ Id.

¹¹ Id.

¹² Id.

and have an opportunity to compete on a level playing field for, job openings.”¹³ The Commission correctly concludes that implementation of effective EEO rules “will benefit job candidates by informing them of opportunities of which they might otherwise be unaware, benefit employers by casting the widest net for capable employees, and benefit the American people by enriching the programming distributed by the electronic media that play such a vital role in our society.”¹⁴ To achieve these important goals, it is incumbent that employers effectively advertise job openings and adopt other effective recruitment policies.

We also agree that discrimination will not be prevented if companies merely refrain from discriminating against anyone who has applied for a job.¹⁵ To effectively deter discrimination, cable companies must take affirmative steps to make potential job applicants aware of positions. The actual steps to be taken by cable operators to make potential job applicants aware of positions in the cable industry are at the heart of the Commission’s cable EEO program.

A. The “Mechanical” Proposal Requiring a Specified Number and Type of Recruitment Sources for Each Position Will Not Achieve the Commission’s Objectives

The Commission seeks comment on what it characterizes as a “mechanical” means of achieving effective cable company recruitment. Under this proposal, cable entities would be required to recruit for vacancies, exclusive of positions filled through internal promotions, using a certain number of sources. The Commission suggests that

¹³ Notice at para. 61.

¹⁴ Id. at para. 6.

¹⁵ Id. at para. 62.

six sources might be required for each vacancy. Of these six, three could be minority or female, and the other three could be general. The Commission would require that at least one of the minority/female sources would be minority and at least one of the others a female source. As a further check on the effectiveness of the process, the Commission suggests that if any of the three minority/female sources failed to produce a candidate for a particular vacancy on three successive occasions, the cable company would be required to look to another source for qualified applicants.

The Commission acknowledges that this approach would be “rather mechanical,”¹⁶ and further that it “may penalize an entity that does not follow the rule even where the entity’s recruiting efforts attract a broad cross section of qualified applicants for consideration.”¹⁷ There are, moreover, two other problems with this proposal.

First, it provides a “one size fits all” answer to a task that, by its nature, does not call for such a rote solution. The proposal might work for certain employment positions in companies serving an area with a heterogeneous labor pool, such as a cable system serving a million subscribers in a major metropolitan area. It is less likely to be appropriate in a rural area with a homogeneous labor pool. A federal mandate of a single EEO recruitment solution of this sort for the nation’s 11,000 cable systems, however well-intentioned, would be extremely difficult to implement in practice.

And second, the proposal assumes a bright line between “general sources” of employment and “minority/female” sources of employment. The Notice seems to imply,

¹⁶ Notice at para.65.

¹⁷ Id. at para.65.

without stating so directly, that in order to qualify as a “minority” or “female” source, the source must either be operated by a minority or a female, or specialize in the hiring of minorities or females. In the cable industry’s experience, however, the situation frequently does not work this way. Cable companies are able to rely upon what the Notice would apparently classify as “general” sources to identify and hire minority and female employees. In fact, there are no national sources of minority and female employees for all positions generally required in the cable industry.

B. A Procedure Tailoring the Number of Sources to the Local Labor Force, While Facially Attractive, Will Be Too Complex to Implement

The Notice also seeks comment on a variation of the proposal to mandate a minimum number of recruitment sources for all vacancies. Under this alternative, the number of recruitment sources is tailored to the size of the local minority labor force. The rationale for this proposal (which is proposed specifically to apply to broadcasters) is that greater recruitment efforts may be warranted in areas with a relatively higher percentage of minorities in the labor force. It is suggested that lesser efforts may be appropriate in areas with a proportionately smaller minority labor force.

On the surface, this proposal may be attractive because it avoids the “one size fits all” scheme for every job in every location. In less populated areas, the smaller potential labor force is unlikely to generate the same number of recruitment sources as in a major metropolitan area. The notion of requiring “fewer” recruitment sources in less populated areas makes sense, in principle, because the number of available sources is likely to be proportional to population and, presumably, the proportion of minority employees to the total population.

But, like the proposal for a single approach for all hires in all locations, this plan is also problematic because, although it makes a distinction based upon location of the employer, it contemplates a single approach for all jobs in the same-sized areas.

Such a rigid scheme will not meet the employment needs of the cable industry. It may be that recruitment for certain professional positions can be accomplished through readily available minority and female sources. Certain national and local professional organizations representing minority or female employees may provide such vehicles and may qualify as recruitment sources for such positions. For other positions, however, equivalent sources may not be readily available.

The cable industry requires specialized personnel to perform critical functions. Cable installers, cable service representatives and cable technicians are usually trained by cable companies to perform necessary functions. There are generally no organizations, analogous to the organizations that facilitate recruitment for other types of positions, to assist cable companies in the hiring of these specialized employees. Generally speaking, these personnel are hired from among local labor forces and trained by cable companies for the particular tasks. In many areas of the country, sources characterized in the Notice as "general sources" are likely to be the only sources available for recruitment for these positions.

Moreover, if this proposal were adopted, an excessive level of government micro-management would be required to decide which areas qualify for particular numbers of minority sources. Disputes at the margin regarding the categories into which various communities fall could lead to a bureaucratic nightmare. And, the absence of recruitment

sources specifically qualifying as “minority” or “female” sources for particular positions, despite a cable operator’s best intentions, could even result in sanctions.

Like the option calling for multiple minority/female and general sources for each vacancy, this proposal is unlikely to achieve the desired real world results. It will impose new costs on cable operators, forcing them to search for what might turn out to be nonexistent recruitment sources. It will require these efforts even in rural areas with small populations, where the number of job opportunities will be limited. The Commission should not adopt this proposal.

C. The Commission Should Adopt a Recruitment Procedure That Enables Cable Companies to Attract a Broad Cross Section of Qualified Applicants for Each Position

The Commission seeks comment on a flexible approach to recruitment under which employers would be afforded “the discretion to determine how to conduct recruitment efforts as long as they can demonstrate that their efforts attract a broad cross section of qualified applicants.”¹⁸ The Commission notes that this approach would be similar to prior EEO efforts in that “it affords entities greater flexibility to fashion their EEO programs. On the other hand, it does not afford the specificity of other proposals.”¹⁹

NCTA recommends that the Commission adopt this proposal. Under our recommendation, cable operators would undertake efforts intended to identify recruiting resources that are reflective of the community as a whole for available vacancies. Cable operators could use national, regional or local sources to demonstrate these efforts. As

¹⁸ Notice at para. 64.

¹⁹ Id.

proposed in the Notice, and consistent with existing procedures, cable entities would not be required to identify recruitment sources for jobs that are filled by internal promotion.²⁰

This proposal would enable cable companies to take account of the differences in jobs and communities and the composition of local labor forces. For certain tasks, such as clerical and cable service representative positions, the positions would be filled, generally, from the local labor force. Cable companies would be expected to advertise locally for these positions. Certain managerial positions, in contrast, might be filled through national and regional as well as local recruitment. In the process of evaluating a cable operator's efforts to recruit minorities and females, the Commission would be expected to take account of national, regional and local recruitment efforts made by the cable operator depending upon the particular positions involved.

Evaluation of a cable system's efforts, under this proposal, must also consider the community served by the operator. In most major metropolitan areas, a cable operator's efforts would be more likely to include minority sources than in most rural areas with homogenous populations. In a larger community serving more cable subscribers there are presumptively more potential job opportunities. In a rural area serving a thousand or fewer subscribers, there are many fewer potential job opportunities.²¹ The evaluation of a cable operator's efforts to identify and utilize minority recruiting sources should take into account the number of job opportunities likely to be available in different locations.

²⁰ Notice at para. 63.

²¹ More than 5800 of the nation's nearly 11,000 cable systems have fewer than 1,000 subscribers. Warren Publishing, Television & Cable Factbook, Services Vol. No. 67, 1999.

The evaluation of a cable operator's efforts to recruit minorities should also take account of the local labor force. In areas with diverse labor forces, both urban and rural, a cable operator's efforts will be expected to include the successful identification of minority applicants. On the other hand, a cable operator might be less successful in the identification of minority recruitment sources in a sparsely populated area that lacks a diverse labor force.

In the process of identifying minority and female applicants, a cable system should not be limited to employment sources owned or operated by minorities or females. Professional organizations whose membership is limited to minorities or females that operate vehicles for employee recruitment may qualify as recruitment sources. But sources characterized by the Notice as "general" may also qualify. A private employment agency, as well as public employment agencies, called upon to identify minority or female employees may turn out to be as effective or more effective as recruitment sources of these employees. A cable operator that relies upon a "general" employment agency that demonstrates over time that it successfully identifies potential minority or female recruits should not be discouraged by the Commission's procedures.

This approach is intended to achieve the Commission's goals by making potential minority and female employees aware of job vacancies in the cable industry, and by limiting the expenditure of recruitment resources where potential minority and female employees are not expected to be interested in available positions.

As explained below, these goals will be further effectuated through the Commission's self-assessment, recordkeeping and sanction procedures.

III. THE PROPOSED SELF-ASSESSMENT PROCESS WILL ENABLE THE COMMISSION TO EVALUATE THE EFFECTIVENESS OF CABLE OPERATORS' RECRUITMENT EFFORTS

The Commission proposes to require cable operators to “continue to analyze their EEO programs on an ongoing basis,”²² and seeks comment on how these analyses should be conducted and enforced. It proposes that cable entities submit, with their Form 395-A Supplemental Investigation Sheet, a statement every five years detailing their recruitment activities for the previous 12 months. It proposes that cable companies be required to analyze their efforts “to recruit, hire and promote in a non-discriminatory fashion and address any difficulties in implementing its EEO program.”²³ The Notice also suggests that this review analyze seniority practices, productivity of recruitment sources, employee pay and benefits, utilization of media for purposes of recruitment, and selection techniques.

NCTA supports Commission adoption of a program to evaluate and analyze cable companies' efforts to identify minority and female recruitment sources. The program should include, as proposed, a requirement that every five years a cable company submit a detailed analysis of its recruitment efforts for the preceding 12 months. The analysis should report on the operator's employment vacancies for the preceding 12 months, and its efforts to identify minority and female candidates for the vacant positions.

The analysis process should also include an evaluation of selection processes to ensure that these processes are effective and not discriminatory. It would be appropriate as part of this process to assess the effectiveness of recruitment sources, so long as the

²² Notice at para.72.

²³ Id.

Commission did not become engaged in micro-management of “good” and “bad” sources. The process should also examine selection techniques and tests to determine whether any of the methods employed by a cable company result in discrimination against a potential job applicant on the basis of race, ethnic origin or sex.

NCTA also supports evaluation of a cable company’s employment practices following the hiring of employees. As part of the review, seniority practices, and pay and benefits, should be evaluated for nondiscrimination.

By obtaining the information which the Commission proposes, and evaluating it as part of the five-year review, the Commission will be able to make determinations regarding the effectiveness of a cable company’s recruitment practices. It will also be able to properly assess whether employees, once hired, are treated in a nondiscriminatory manner.

IV. EFFECTIVE RECORDKEEPING IS NECESSARY TO ACHIEVE THE COMMISSION’S OBJECTIVES

NCTA supports the adoption of the Commission’s proposals for EEO recordkeeping. The Commission proposes that cable operators retain records that demonstrate their compliance with the proposed recruitment processes. By maintaining these detailed records, cable operators will be able to show that they are undertaking credible efforts to recruit qualified minority and female applicants for all vacancies.

The Commission’s proposal to record all recruiting sources utilized for each vacancy should be adopted. The Commission should also require listing the dates the vacancies were filled; dated copies of all advertisements, bulletins and letters announcing vacancies; and compilations totaling the race, ethnic origin, and sex of all applicants

generated by each recruiting source according to vacancy. These materials would then be available for review by Commission staff in either an on-site audit or a letter audit.²⁴

These steps, in conjunction with the self-assessment process, will significantly assist the Commission in determining the effectiveness of its cable EEO program. It will also permit the Commission to judge whether cable companies are making effective efforts to include minorities and females within applicant pools. Finally, it will enable cable companies to ascertain whether recruitment sources are sufficiently fruitful, and to select alternative sources where existing sources are not generating diverse applicants on a regular basis.

The record-keeping process should be undertaken and analyzed within the context of a cable operator's overall efforts to identify minority and female applicants for each vacancy. If a cable operator's efforts do not result in the successful identification of recruitment sources for certain positions or in certain geographic areas, records merely indicating unsuccessful efforts should not be presumed to demonstrate a violation of the rules. The Commission should look beyond the bare records for an explanation for the operator's unsuccessful efforts before any sanctions should even be considered.

²⁴ This approach would be preferable to the more burdensome arrangement described at paragraph 77 of the Notice. This arrangement would impose a new reporting requirement, applicable to all cable operators, under which operators, as part of their annual Form 395-B submission, would be required to submit data concerning the total number of applicants received from each listed source, as well as the total number of minority and total number of female applicants received.

V. SANCTIONS SHOULD NOT BE IMPOSED UPON CABLE OPERATORS UNDERTAKING CREDIBLE EFFORTS TO IDENTIFY MINORITY AND FEMALE APPLICANTS FOR EACH VACANCY, AS LONG AS REQUIRED REPORTS ARE TIMELY FILED AND CABLE COMPANIES DO NOT ENGAGE IN UNLAWFUL DISCRIMINATION

The Commission may impose sanctions upon a cable operator for not complying with the agency's EEO rules. But the Commission should not impose sanctions where a cable operator undertakes credible efforts to comply with the Commission's EEO program and goals, submits required filings in a timely manner and does not engage in unlawful discrimination. Sanctions should be imposed upon only those cable operators who knowingly and willfully violate the FCC's EEO rules.

Cable companies that undertake credible efforts to identify minority and female applicants for vacancies, even if those efforts are not successful, should not be subject to sanction. Rather, sanctions should be limited to a situation where a cable operator is not engaging in credible efforts to identify minority and female applicants. Under one most obvious example, the Commission could investigate and potentially impose a sanction if a cable operator serving a diverse community with a diverse labor force evidenced a consistent, continuing inability to identify minority applicants.

The Commission could also sanction a cable operator for willfully failing to submit required EEO information. Sanctions would also be appropriate for cable operators who failed to substantially maintain required records. The Commission could, in addition, sanction a cable operator who willfully filed untruthful statements in required EEO submissions.

Finally, Commission sanctions would be appropriate if a cable operator engaged in unlawful discrimination in violation of the Communications Act or the Commission's

rules. In that circumstance, the Commission could investigate the matter and impose an appropriate sanction.

CONCLUSION

For the reasons stated above, the Commission should adopt proposed cable EEO rules changes as discussed herein.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Daniel L. Brenner", is written over a horizontal line.

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